Waja Manufacturing (M) Sdn Bhd (formerly known as Palsticon Pet (M) Sdn Bhd) & Ors v Alliance Bank Malaysia Bhd and other appeals

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02(I)-39 OF 2008(W), 02(I)-40 OF 2008(W) AND 02(I)-41 OF 2008(W)
ARIFIN ZAKARIA CJ (MALAYA), HASHIM YUSOFF AND GOPAL SRI RAM FCJJ
28 JUNE 2009

Civil Procedure — Action — Consolidation of actions — Whether application for consolidation premature where plaintiff's summary judgment applications pending disposal — Whether defence must be filed before consolidation — Rules of the High Court 1980 O 4 r 1

Civil Procedure — Pleadings — Defence, service of — Obligation to file and serve defence where plaintiff applied for summary judgment — Rules of the High Court 1980 O 18 r 2

The respondent in all the appeals was a bank which had lent money to three companies. As the loans were defaulted upon, the respondent brought separate actions against each of the borrowers and the guarantors of the loans. The three companies and the guarantors brought a separate action against the bank for breach of an agreement to disburse certain monies that it had promised to advance for the purchase of some machinery. The bank applied for summary judgment in each of its suits and the appellants applied to consolidate the actions. The application for consolidation was dismissed by the High Court and the Court of Appeal dismissed the appeal therefrom. The only ground on which the Court of Appeal dismissed the appeal was that the appellants had not filed their defence. The appellants obtained leave to appeal from the Federal Court on the following question: whether the filing of a defence was a prerequisite to an application by a defendant for an order that matters be consolidated or heard together under O 4 r 1 of the Rules of the High Court 1980 ('RHC').

Held, dismissing the appeal with no order as to costs:

(1) The appellants having been served with summonses for judgment were relieved from delivering their defences to the several actions until after the disposal of those summonses. This is made clear by O 18 r 2 of the RHC (see para 2).

(2) Further, based on O 4 r 1 of the RHC, there is no requirement that a defence must have been filed (see para 3).

(3) The present actions were at the stage at which the bank's summary judgment applications were pending disposal before the High Court. The High Court could enter summary judgment in the bank's favour which would render any application for consolidation academic. Thus, the appellants' application for consolidation was premature on this ground and not on the ground held by the Court of Appeal (see para 6).

[Bahasa Malaysia summary

Responden di dalam kesemua rayuan adalah bank yang telah memberikan pinjaman kepada tiga buah syarikat. Oleh sebab pinjaman-pinjaman tersebut tidak dibayar, responden memulakan tindakan secara berasingan terhadap setiap peminjam dan penjamin pinjaman-pinjaman tersebut. Ketiga-tiga syarikat dan penjamin memulakan tindakan yang berasingan terhadap bank bagi kemungkiran perjanjian untuk memberikan wang yang dijanjikan bagi pembelian beberapa mesin. Pihak bank memohon untuk penghakiman terus di dalam setiap guamannya dan perayu-perayu memohon untuk menyatukan tindakan-tindakan tersebut. Permohonan untuk penyatuan ditolak oleh Mahkamah Tinggi dan Mahkamah Rayuan menolak rayuan seterusnya. Satu-satunya alasan Mahkamah Rayuan menolak rayuan tersebut adalah bahawa perayu-perayu tidak memfailkan pembelaan mereka. Perayu-perayu memperoleh kebenaran untuk merayu daripada Mahkamah Persekutuan atas persoalan berikut: sama ada pemfailan pembelaan adalah prasyarat kepada permohonan oleh defendan untuk satu perintah bahawa perkara-perkara tersebut boleh disatukan atau dibicarakan bersama di bawah A 4 k 1 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT').

Diputuskan, menolak rayuan tanpa perintah untuk kos:

(1) Perayu-perayu, setelah diserahkan dengan saman untuk penghakiman dibebaskan daripada memasukkan pembelaan kepada beberapa tindakan sehingga pelupusan saman-saman tersebut. Perkara ini jelas di bawah A 18 k 2 KMT (lihat perenggan 2).

(2) Selanjutnya, berdasarkan A 4 k 1 KMT, tidak ada keperluan bahawa pembelaan semestinya telah difailkan (lihat perenggan 3).

(3) Tindakan-tindakan ini adalah pada peringkat di mana permohonan penghakiman terus oleh bank menunggu pelupusan oleh Mahkamah Tinggi. Mahkamah Tinggi boleh memasukkan penghakiman terus memihak kepada bank yang akan menyebabkan apa-apa permohonan untuk penyatuan adalah akademik. Oleh itu, permohonan perayu-perayu untuk penyatuan adalah pramatang atas alasan ini dan bukan atas alasan seperti yang diberikan oleh Mahkamah Rayuan (lihat perenggan 6).]

Notes

For cases on consolidation of actions, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 94–105.

For cases on pleadings generally, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5775–6504.

Cases referred to

Daws v Daily Sketch and Daily Graphic Ltd and another [1960] 1 WLR 126, CA (distd)

Horwood v Statesman Publishing Co, Ltd and others [1929] All ER Rep 554, CA (refd)

Legislation referred to

Rules of the High Court 1980 O 4 r 1, O 18 r 2

Malik Imtiaz Sarwar (M Indrani with him) (M Indrani Lee & Co) for the appellant.

N Chandran (Koh Yew Chong with him) (Albar & Partners) for the respondent.

Gopal Sri Ram FCJ (delivering judgment of the court):

[1] There are three appeals before us. The respondent to these appeals is a bank. It lent money to three companies, Waja Manufacturing (M) Sdn Bhd, Polyrak Industries Sdn Bhd and Portola Closure Manufacturing Sdn Bhd. Its case is that these loans were defaulted upon. So, it brought separate actions against each of the borrowers and the guarantors of the loans. The three companies and the guarantors brought a separate action against the bank for breach of an agreement to disburse certain monies that it had promised to advance for the purchase of some machinery. Later, the bank took out a summons for judgment in each of its suits. The appellants are resisting the summonses. They also took out a summons to consolidate the actions. That summons was dismissed by the High Court. An appeal to the Court of Appeal failed. The appellants then applied to this Court and obtained leave to appeal on the question: whether the filing of a defence is a prerequisite to an application by a defendant for an order that matters be consolidated or heard together under O 4 r 1 of the Rules of the High Court 1980. Arguments were heard, the question reserved though answered in the negative, these appeals were nevertheless dismissed for the reasons that now follow.

[2] The only ground on which the Court of Appeal dismissed the appeal is that the appellants had not filed their defence. That finding is flawed for two reasons, one having to do with the circumstances of this case and the other based on principle. As for the first, it is clear that in the present instance the appellants having been served with summonses for judgment are relieved from delivering their defences to the several actions until after the disposal of those summonses. This is made clear by the RHC O 18 r 2 which states:

(1) Subject to paragraph (2), a defendant who enters an appearance in, and intends to defend, an action must, unless the Court gives leave to the contrary, serve a defence on the plaintiff before the expiration of 14 days after the time limited for appearing or after the statement of claim is served on him, whichever is the later.

(2) If a summons under Order 14, rule 1, is served on a defendant before he serves his defence, paragraph (1) shall not have effect in relation to him unless by the order made on the summons he is given leave to defend the action and, in that case, shall have effect as if it required him to serve his defence within 14 days after the making of the order or within such other period as may be specified therein.

[3] As for the second reason, this turns on the construction of RHC O 4 r 1 which reads:

(1) Where two or more causes or matter are pending, then, if it appears to the Court —

(a) that some common question of law or fact arises in both or all of them; or

(b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions; or

(c) that for some other reason it is desirable to make an order under this rule,

the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them.

As may be seen, there is no requirement that a defence must have been filed. Yet, the bank sought to argue otherwise in reliance of the decision in *Daws v Daily Sketch and Daily Graphic Ltd and another* [1960] 1 WLR 126 which it said is authority for the proposition that the filing of a defence is a sine qua non for the rule to bite.

[4] *Daws* was a libel action. Two suits had been filed against the same defendants in respect of the same article. The plaintiff in the first suit and the plaintiffs in the second suit were represented by the same solicitors. In the first suit the defendants admitted that the words complained of referred to the plaintiff, denied that the words were defamatory, and pleaded an offer of an apology in mitigation of damage. In the second action the defendants denied that the words complained of referred to the plaintiffs, and denied that they were defamatory, but did not rely on any offer of an apology. The High Court ordered consolidation but the Court of Appeal reversed on the ground that Scrutton LJ's dictum in *Horwood v Statesman Publishing Co, Ltd and others* [1929] All ER Rep 554 at p 558 did not apply to the case before the court. This is what Scrutton LJ said:

> The result of the later decisions is that you must look at the language of the rules and construe them liberally, and that where there are common questions of law or fact involved in different causes of actions you should include all parties in one action, subject to the discretion of the court, if such inclusion is embarrassing, to strike out one or more of the parties. It is impossible to lay down any rule as to how the discretion of the court ought to be exercised. Broadly speaking, where claims by or against different parties involve or may involve a common question of law or fact, bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matters should be disposed of at the same time, the court will allow the joinder of plaintiffs or defendants, subject to its discretion as to how the action should be tried.

[5] Willmer LJ in *Daws* was satisfied that:

> … when we look at the issues raised in the present cases we are far from finding here
>
> a common question of law or fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matters should be disposed of at the same time …
>
> The only issue in the two actions which is, strictly speaking, common to both of them is the issue whether the words are defamatory at all, an issue which, as counsel for the plaintiffs suggested, might well be one which would not give the jury very much trouble. But there are very distinctive differences between the matters in issue in the two actions, having regard to the different defences put forward, to which I have already referred.

As may be seen, the circumstances in which consolidation was refused in *Daws* are very different from those present in the instant case. Prima facie, therefore it would appear that the High Court and the Court of Appeal were wrong here in declining consolidation. But there are other grounds on which their ultimate orders may be supported.

[6] To recall, the present actions are at the stage at which summonses for judgment in the bank's actions are pending disposal before the High Court. That court may enter summary judgment in the bank's favour which would render any application for consolidation academic. Or it may grant the appellants unconditional leave to defend in which event the appellants will be able to seek consolidation of the several actions. These matters show that the appellants' present application for consolidation to be premature. And it is on that ground that the order of the Court of Appeal must be upheld.

[7] The real case for the appellants is that they want all the summonses for judgments taken together. The bank does not oppose this course. Any apparent difficulty may quite easily be resolved administratively under the new tracking system that is in place at the Kuala Lumpur High Court. All it requires is for the

parties to place their request before the managing judge of the Commercial Division who will no doubt accede to it.

[8] For the reasons already given the appeal was dismissed. Having regard to the fact that the Court of Appeal found against the appellants for the wrong reasons and having regard to the justice of the case, no order as to costs at all levels was made and the deposit in court was ordered to be refunded to the appellants.

Appeal dismissed with no order as to costs.

Reported by Kanesh Sundrum